



Federal Communications Commission
Washington, D.C. 20554

DA 03-1944
June 12, 2003

Patrick Shannon, Esq.
Latham & Watkins, LLP
555 Eleventh Street, N. W., Suite 1000
Washington, D.C. 20004-1304

Re: Lynch 3G Communications Corporation

Dear Mr. Shannon:

This letter responds to the Request for Clarification and Waiver that you filed on May 6, 2003, on behalf of your client, Lynch 3G Communications Corporation (“Lynch”).¹ Lynch requests a clarification that its upfront payment for Auction No. 49 was timely made or, alternatively, a waiver of the upfront payment deadline for that auction. Lynch’s waiver request is based on its claim that Lynch’s bank failed to transfer the required funds to the Commission’s account at Mellon Bank before the upfront payment deadline.² For the reasons set forth below, we find that Lynch’s upfront payment was not timely submitted; however, we grant Lynch’s waiver request.

On March 4, 2003, the Commission first notified applicants for Auction No. 49 that the deadline for submission of upfront payments was 6:00 PM (ET) on May 2, 2003.³ The Commission also warned applicants that “[f]ailure to deliver the upfront payment by the May 2, 2003 deadline will result in dismissal of the application and disqualification from participation in the auction.”⁴

Lynch contends that its failure to timely submit its upfront payment resulted from an error on the part of its bank, State Street Bank (“State Street”), in processing Lynch’s wire transfer request.⁵ Specifically, at 9:10 AM on May 2, 2003, Lynch’s Chief Financial Officer (“CFO”) transmitted instructions to State Street to wire an upfront payment to the Commission’s account at Mellon Bank.⁶ Lynch claims that its instructions included all the necessary information to successfully complete the wire transfer.⁷ Shortly after sending the wire instructions, Lynch’s CFO contacted a representative from State

¹ See Letter from Patrick Shannon, Counsel for Lynch 3G Communications Corporation to Marlene Dortch, Commission Secretary (May 6, 2003) (“Request”).

² Request at 2.

³ See Auction of Licenses in the Lower 700 MHz Band Scheduled for May 28, 2003, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures, *Public Notice*, 18 FCC Rcd. 3138, 3162 (2003).

⁴ *Id.*

⁵ Request at 2.

⁶ Request at 1.

⁷ *Id.*

Street to confirm receipt of the instructions and to stress the importance of the wire transfer.⁸ At 11:03 AM on May 2, 2003, Lynch submitted its completed FCC Form 159 to Mellon Bank.⁹ At 1:55 PM, State Street wired the full amount of Lynch's upfront payment to Mellon Bank.¹⁰ At approximately 4:15 PM, Lynch's CFO telephoned a State Street representative to confirm that the wire transfer had been completed and to obtain the related Federal Reference Number.¹¹ During the conversation, the State Street representative learned that Mellon Bank had received Lynch's wire transmission at 3:30 PM, but had returned the funds to State Street at 4:05 PM.¹² After Lynch's CFO confirmed the accuracy of the information he had provided to State Street, he instructed the State Street representative to immediately wire the upfront payment to Mellon Bank again.¹³ At approximately 4:30 PM, Lynch's CFO contacted Commission staff and inquired about measures that could be taken to prevent Mellon Bank from returning Lynch's funds a second time.¹⁴ On Monday, May 5, 2003, Lynch's CFO contacted State Street and learned that despite his instructions, Lynch's wire transfer was not successfully completed until that morning.¹⁵ Also on May 5, 2003, Lynch's CFO contacted Commission staff who confirmed that Mellon Bank had received Lynch's upfront payment at 3:30 PM on May 2, 2003, but returned the funds to State Street because State Street had entered an incorrect Beneficiary ("BNF") Number on the wire transfer form.¹⁶

We decline to find that Lynch timely made its upfront payment. Lynch argues that a waiver of the upfront payment deadline is not necessary because its upfront payment was received by Mellon Bank before the deadline, even though Mellon Bank subsequently returned the payment.¹⁷ We disagree. Although Lynch's funds were received by Mellon Bank, because State Street's wire transfer form included an incorrect BNF number, Mellon Bank was unable to deposit the funds into the Commission's account. In order to meet the Commission's upfront payment deadline, an applicant's payment must be credited to the Commission's account by the deadline. Because Lynch failed to make its upfront payment by the deadline, we must decide whether a waiver of the deadline is appropriate.

⁸ Request at 1.

⁹ *Id.*

¹⁰ Request at 2.

¹¹ *Id.* A Federal Reference Number confirms that the funds have been released from the payor's bank into the Federal Reserve System. See Letter from Margaret W. Wiener, Chief, Auction and Industry Analysis Division to Sara F. Liebman, Counsel for Jeff Scott Cofsky d/b/a Texas License Consultants, DA 03-1581, at 2, (rel. May 12, 2003).

¹² Request at 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

To obtain a waiver of the Commission's competitive bidding rules,¹⁸ Lynch must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.¹⁹

Lynch argues that it should be granted a waiver of the upfront payment deadline because it exercised reasonable diligence in attempting to make timely payment, and additional diligence on its part would not have prevented State Street's error and return of the funds by Mellon Bank.²⁰ Lynch further maintains that, upon learning of the error, it took such action as was necessary to remedy the problem. Lynch also states that it had sufficient funds available on the day of the deadline to make the upfront payment.²¹ Although we believe that Lynch could have avoided last minute problems by initiating the wire transfer process prior to the day of the upfront payment deadline, on the basis of the record before us, we conclude that Lynch has demonstrated that grant of a waiver would not frustrate the underlying purpose of the deadline.²² The Commission has repeatedly cautioned auction participants regarding the importance of planning ahead to account for unforeseen last minute difficulties. In particular, applicants were warned to avoid untimely payments by "discuss[ing] arrangements (including bank closing schedules) with their banker several days before they plan to make a wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline."²³ In this case, Lynch initiated the wire transfer process sufficiently in advance of the upfront payment deadline to allow for timely payment.

We also find that Lynch would have met the payment deadline but for the error on the part of its bank. The error occurred when State Street's representative provided the wrong BNF number in making the upfront payment wire transfer to Mellon Bank. Lynch's efforts demonstrated reasonable diligence in trying to comply with the deadline for submission of its upfront payment. Early in the morning of May 2, 2003, Lynch's CFO sent instructions to State Street to wire an upfront payment to the Commission's account at Mellon Bank.²⁴ Lynch had sufficient funds available to make its upfront payment.²⁵ Lynch followed up with its bank by telephoning its State Street representative to confirm receipt of the instructions and emphasize the importance of the transaction.²⁶ State Street, in turn, completed the wire transfer to Mellon Bank early in the afternoon of May 2, 2003. Mellon Bank received Lynch's upfront

¹⁸ 47 C.F.R. § 1.2106.

¹⁹ 47 C.F.R. § 1.9215.

²⁰ Request at 2-3.

²¹ *Id.*

²² 47 C.F.R. § 1.2106.

²³ *Auction No. 49 Procedures Public Notice*, 18 FCC Rcd, 3138, 3162.

²⁴ Request at 1-2, and Exh. A.

²⁵ Request at 3.

²⁶ Request at 1.

Patrick Shannon, Esq
June 12, 2003

payment on May 2, 2003, as evidenced by Mellon Bank's return of Lynch's upfront payment to State Street. Thus, the full upfront payment amount was received by Mellon Bank a number of hours prior to the payment deadline. In addition, Lynch was attentive to the payment process in the period after the transfer of funds. Because Lynch's CFO contacted State Street's representative to confirm completion of the wire transfer, Lynch learned before the deadline had passed that Mellon Bank had returned Lynch's upfront payment. This enabled Lynch to instruct State Street to make another effort to wire the upfront payment to the Commission's account at Mellon Bank and to alert Commission staff of the situation. As a result of Lynch's efforts, the wire transfer of its upfront payment was completed on the next business day, causing only a brief delay.²⁷ Therefore, we conclude that a waiver of the upfront payment deadline is warranted in this case.

This action is taken under delegated authority pursuant to Section 0.331 of the Commission's rules.²⁸

Sincerely,

Margaret W. Wiener, Chief
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

²⁷ See Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Timi Okoinyan, President and CEO, Trompex Corporation, at 2 (February 14, 2000) (wire transfer was effectuated immediately on the next business day, causing only a brief delay).

²⁸ 47 C.F.R. § 0.331.